Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010

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PORTIA BAKER ANDREWS

Petitioner,

v.

ASSOCIATED ANESTHESIOLOGISTS SERVICE, P.C.

Respondent.

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On Petition For A Writ Of Certiorari To
The District of Columbia Court of Appeals

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# PETITION FOR WRIT OF CERTIORARI

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August 12, 2010

## QUESTION PRESENTED

Respondent's Rule 50(a) motion for judgment as a matter of law was denied and the case had been submitted to the jury for a verdict. Under the circumstances, was Petitioner deprived of her constitutional right to a trial by jury when the trial court later substituted itself as the trier of fact by granting Respondent's request for a dispositive supplemental instruction (or partial motion for judgment as a matter of law) that removed from the jury's consideration the disputed factual questions regarding the critical moment of two anesthesiologists' deviation from the standard of care by failing to preserve an airway for decedent before decedent's hematoma was released by the surgeon?

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 2

JURISDICTION ..... 2

CONSTITUTIONAL PROVISION AND RULES INVOLVED ..... 2

STATEMENT OF THE CASE ..... 4

REASONS FOR GRANTING WRIT ..... 8

A. That the Seventh Amendment Confers the Responsibility for Factual Determination On A Jury and Prohibits a Judge From Usurping the Province of the Jury By Substituting Itself as the Trier of Fact After the Case Had Been Submitted to the Jury for a Verdict is a Fundamental and Important Right That Warrants Continued Protection ..... 8

B. The Decision Below Raises Not Only Significant and Recurring Serious Problems for Judge-Jury Relations and Juror Offending Judicial Administration, But Suggests the Need for Guidance From This Court As to the Wisdom of Allowing a

Case to Continue With the Jury Without Undue Dispositive Interruption of the Jury's Fact-finding Deliberation by the Trial Court When There is Reasonable Room for a Difference of Opinion Regarding the Evidence . . . . . 28

CONCLUSION . . . . . 32

**Appendix**

A. Order Denying Rehearing and Rehearing En Banc, May 14, 2010 . . . . . 1a

B. Memorandum Opinion and Judgment of the District of Columbia Court of Appeals, March 16, 2010 . . . . . 3a

C. Superior Court's Supplemental Jury Instruction from the Bench, Trial Transcript of June 27, 2007 . . . . . 32a

## TABLE OF AUTHORITIES


| Cases | Pages |
|---|---|
| Anderson v. Libby Lobby, Inc.<br>477 U.S. 242, 255 (1986) | 12, 18 |
| Baltimore & Carolina Line, Inc. v. Redman<br>295 U.S. 654, 659 (1935) | 30 |
| Burdell v. Denig<br>92 U.S. 716 (1876) | 26 |
| Capital Traction Co., v. Hof<br>174 U.S. 1 (1899) | 12 |
| Chauffeurs v. Terry<br>494 U.S. 558 (1990) | 27 |
| Cool v. United States<br>409 U.S. 100 (1972) | 31 |
| Corley v. BP Oil Corp.<br>402 A.2d 1258 (D.C. 1979) | 29 |
| Dairy Queen, Inc., v. Wood<br>369 U.S. 469 (1962) | 30 |
| Dimick v. Schiedt<br>293 U.S. 474 (1935) | 27 |
| Duncan v. Louisiana<br>419 U.S. 522, 530 (1975) | 9 |

Galloway v. United States
319 U.S. 372,396 (1943) (Black dissenting) . . . . . 9

Greenleaf v. Birth
34 U.S. 292 (1835) . . . . . 27

Gunning v. Cooley
281 U.S. 90 (1930) . . . . . 26

Jacob v. New York
315 U.S. 752 (1942) . . . . . 25

Johnson v. Weinberg
434 A.2d 404 (D.C. 1981) . . . . . 29

Jones v. East Tennessee, Vir., and Ga RR Co
128 U.S. 443 (1888) . . . . . 25

LaPrade v. Rosinsky
882 A.2d 192 (D.C. 2005) . . . . . 19

Lytle v. Household Manufacturing, Inc.
494 U.S. 545 (1990) . . . . . 20

Marbury v. Madison
5 U.S. 137 (1803) . . . . . 27

Parklane Hosiery Co., v. Shore
439 U.S. 322,337 (1979) (CJ,Rehnquist,
dissenting) . . . . . 9

Pernell v. Southall Realty
416 U.S. 363 (1974) . . . . . 12

Railroad Company v. Stout
84 U.S. 657 (1873) . . . . . 20

Reeves v.Sanderson
530, U.S. at 147 . . . . . 12, 22

Schecter v. Merchants Home Delivery, Inc.
892 A.2d 415 (D.C. 2006) . . . . . 29

Scott v. Lloyd
34 U.S. 418 (1835) . . . . . 9., 11

Seganish v. D.C. Safeway Stores, Inc.
132 U.S. App., D.C. 117, 122, 406 F.2d 753
(D.C. Cir. 1986) . . . . . 29

Starr v. United States
153 U.S. 614 (1894) . . . . . 26

Tennant v. Peioria & Pekin Union
Railway, Co.
321 U.S. 29, 35 (1944) . . . . . passim

Thiel v. Southern Pacific Co.
328 U. S. 217 (1946) . . . . . 13

Tiller v. Atlantic Coast Line Railroad Co.
318 U.S. 54 (1943) . . . . . passim

Warren v. Medlantic Health Group, Inc., et al.
936 A.2d 733. 737 (D.C. 2007) . . . . . passim

Other Authorities:

Seventh Amendment,
United States Constitution . . . . . passim

Rule 38, Federal Rules of Civil Procedure . . . . . 3, 32

Rule 50(a), Federal Rules of Civil Procedure . passim

Rule 50(a)(2), Federal Rules of Civil
Procedure . . . . . passim

Rule 50(b), Federal Rules of Civil Procedure . passim

Rule 50, Federal Rules of Civil Procedure,
Notes of Advisory Committee on 1963
Amendments. Subdivision (a) . . . . . passim

Blume, Origin and Development of the
Directed Verdict, 48 Mich. L. Rev.
555, 582-85, 589-90 (1950) . . . . . 6, 30

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# PETITION FOR WRIT OF CERTIORARI

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The petitioner, Portia Baker Andrews, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered in this proceeding on March 16, 2010.

## OPINIONS BELOW

The memorandum opinion and judgment of the District of Columbia Court of Appeals is not published nor reported, it appears in Appendix B hereto at pages 3a-31a. No opinion was rendered by the Superior Court of the District of Columbia. However, after the case involving the two anesthesiologists was submitted to the jury, excerpts from the trial transcript containing the supplemental (peremptory) instruction, removing the intensely disputed factual issues regarding the negligence of the two anesthesiologists from the province of the jury, are contained in Appendix C hereto at page 32a.

## JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on March 16, 2010. A timely petition for rehearing en banc was denied on May 14, 2010, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a ) & (b).

## CONSTITUTIONAL PROVISION AND RULES INVOLVED

The constitutional provision involved is the Seventh Amendment preserving the right of trial by jury. The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty

> dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The civil rules involved are Rule 38 and Rule 50 of the Federal Rules of Civil Procedure.

Rule 38[1] provides in pertinent part:

(a) *Right preserved.* The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by an applicable statute shall be preserved to the parties inviolate.

Rule 50(a)(2)[2] provides in pertinent part: A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury.

Rule 50(b) provides in pertinent part: If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the

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[1]Rule 38(a), Civil Rules of the Superior Court of the District of Columbia is identical to Rule 38, Federal Rules of Civil Procedure.

[2]Rule 50(a)(2) and Rule 50(b), Civil Rules of the Superior Court of the District of Columbia are substantially identical to Rule 50(a)(2) and Rule 50(b), Federal Rules of Civil Procedure.

court's later deciding the legal question raised by the motion.

## STATEMENT OF THE CASE

This case involves a medical malpractice jury trial against, among others, two treating anesthesiologists.[3] After the case against all the treating physicians had been submitted to the jury, the case against the two treating anesthesiologists was later aborted prior to the jury rendering its verdict, when disputed factual questions regarding the negligence of the two anesthesiologists were removed from the jury's province by a supplemental (peremptory) instruction of the trial court informing the jury by direction that: "there is no issue in this case that [the two anesthesiologists] deviated from the standard of care by failing to preserve a[n] airway [for decedent] before the hematoma was released by [the surgeon]." (App. 33a).

In reality, the supplemental (peremptory) instruction on the disputed factual issues was a judgment as a matter of law for the two anesthesiologists. (App.21a). The jury continued its deliberations and returned a defense verdict. The trial judge's peremptory instruction substituted himself, as

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[3]Respondent Associated Anesthesiologists Services stipulated that it was Dr. Begin's and Dr. Fitzpatrick's employer, and that the two physicians were acting within the scope of their employment at all relevant times. (App. 6a,n2). Respondent is the only remaining party in the case.(App. 6a,n2).

fact finder in derogation of the jury constitutional in a jury trial, and usurped the jury's province, i.e., its fundamental fact finding function regarding the negligence of the two treating anesthesiologists in the case. The timing of this grant of an unauthorized judgment as a matter of law under the guise of a so-called "curative instruction" was not only unconstitutional and in contravention of the procedure set forth in Rule 50, but it caught Petitioner by surprise[4], was prejudicial because it provided insufficient time for Petitioner to prepare an effective opposition, was misleading, confusing to the jury and gave offense to the jury by requiring them to assent to a verdict that members of the jury did not reach by their own deliberations. *See*, Federal Rules of Civil

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[4]This case raises constitutional implications also sounding in due process violations because the trial judge gave a surprised supplemental instruction--curative or otherwise--that undermined and fundamentally changed the way a jury was to consider a case--after a Rule 50(a) motion was denied and counsel have given closing argument and the case submitted to the jury. Rule 50 contains a delicately balanced process for making and deciding dispositive motions for judgment as a matter of law *before* verdict and *after* verdict that when followed prevents undue surprise, jury disruption or jury usurpation *during* the jury's actual deliberation and search for the truth in a jury trial. A party is deprived of the Seventh Amendment right to a jury trial when the nature of the case submitted to the jury for a verdict is radically changed at the judge's direction not *before* or *after* jury deliberation but midstream,i.e., *during* jury deliberation of the case as argued to and submitted to the jury.

Procedure, Rule 50, Notes of Advisory Committee on 1963 amendments. Subdivision (a). *See also*, Blume, Origin and Development of the Directed Verdict, 48 Mich. L. Rev. 55, 582-85, 589-90 (1950).

A brief factual summary of the underlying case is as follows: the patient, Decedent Alma L. Baker, apparently bled from the site of a routine surgery on her carotid artery. (App. 3a-4a). The blood pooled in her neck and compressed her trachea, effectively choking her. (App. 4a). The two anesthesiologists administered oxygen for a time to the patient before the arrival of a surgeon on the scene. (App. 4a). After arriving on the scene, the surgeon made an incision in decedent's neck to drain the blood, which it was thought would release the pool and relieve the patient's breathing distress. However, decedent continued to deteriorate, and the attending surgeon attempted to perform an emergency cricothyroidotomy, a procedure to establish an airway allowing air to flow into and out of her trachea. (See generally,App.4a). The cricothyroidotomy was unsuccessful, and the patient suffered brain damage and eventually died. (App.4a).

At trial, Petitioner's expert and Respondent's experts "differed on when surgical procedures became necessary" under the applicable national standard of care in the circumstances of the case presented to the jury. (App. 5a). Petitioner's expert testified that the patient reached a critical moment before the surgeon released the hematoma. (App. 5a). The defendants' experts testified that the critical moment occurred only afterward. (App. 5a). Following the close of all the evidence, denial of Rule 50(a) motions, argument of

counsel, and giving of jury instructions, the case was submitted to the jury for deliberation and decision. After the case was submitted to the jury, and while the jury was examining the disputed facts regarding breach of the standard of care by the two anesthesiologists, counsel for Respondent requested a so-called curative instruction in order to remove from the jury, the dispute regarding the two anesthesiologists' deviation from the standard of care by failing to preserve an airway for decedent before the hematoma was released by the surgeon. Counsel for plaintiff opposed the trial court's interruption the jury's deliberation to give an improper instruction or otherwise interfering with the jury during its deliberation regarding the case submitted to the jury. After hearing extended discussion out of the presence of the jury, the trial court interrupted the jury's deliberations in the jury room and returned the jury to the courtroom where the following so-called "curative" (peremptory) instruction was given:

THE COURT: "I instruct you as follows: That there is no issue in this case that Dr. Fitzpatrick and Dr. Beg[i]n deviated from the standard of care by failing to preserve a[n] airway before the hematoma was released by Dr. Kowalski." See Appendix C at 32a.

THE JUROR: "Your Honor, could [you] please explain again the statement you brought up regarding Dr. Fitzpatrick and Dr. Beg[i]n." See Appendix C at 32a.

THE COURT: I'm not sure I can explain it, I can repeat.

THE JUROR: Just repeat, thank you.

THE COURT: Sure. That there is no issue in this case that Dr. Fitzpatrick and Dr. Beg[i]n[5] deviated from the standard of care by failing to preserve an airway before the hematoma was released by Dr. Kowalski." See, App. at 32a.

After giving the above peremptory instruction, the jury was allowed to continue its deliberations and returned a defense verdict. On appeal, the District of Columbia Court of Appeals expressly acknowledged that the issue on appeal was "an intensely factual one" requiring the Court of Appeals "to discuss the evidence in considerable detail." (App. at 5a). After re-examining the factual questions regarding the medical negligence of the two anesthesiologists, the Court of Appeal concluded "that there was insufficient evidence from which a reasonable jury could have found the anesthesiologists negligent before the surgeon released the hematoma" and affirmed the decision of the trial court. (App. at 5a). Petitioner's Petition for Rehearing and Rehearing En Banc was denied on May 14, 2010, and this petition for writ of certiorari is filed with this Court within 90 days thereof.

## REASONS FOR GRANTING THE WRIT

A. That the Seventh Amendment Confers the Responsibility for Factual Determination On A Jury and Prohibits a Judge From Usurping the Province of the Jury By

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[5]Drs. Begin and Fitzpatrick were the two anesthesiologists. See, App.4a.

Substituting Itself as the Trier of Fact After the Case Had Been Submitted to the Jury for a Verdict is a Fundamental and Important Right That Warrants Continued Protection

The most fundamental element of a jury trial is its fact-finding function. *Galloway v. United States*, 319 U.S. 372,392 (1943). *Accord, Parklane Hosiery Co., Inc., v. Shore*, 439 U.S. 322, 337(1979). In fact, under the Seventh Amendment to the Constitution of the United States, the plain meaning of its text, and settled precedents of this Court interpreting the text, make clear that the examination and determination of disputed facts in a civil jury trial is unambiguously the province of the jury - - not that of a judge. *Scott v. Lloyd*, 34 U.S. 418 (1835). Moreover, in full deference to the Seventh Amendment's right to a trial by jury inviolate, Rule 50 of the Federal Rules of Civil Procedure mandates the timing when a motion for judgment as a matter of law can be made and prohibits a judge from deciding the legal questions raised by a motion for judgment as a matter of law after the case has been submitted to the jury and prior to its verdict. *See generally, Scott v. Lloyd*, 34 U.S. 418 (1835). *Compare, Parklane Hosiery Co., v. Shore*, 439 U.S. 322,337 (1979)(CJ,Rehnquist, dissenting)and *Galloway v. United States*, 319 U.S. 372,396 (1943)(Black dissenting). The essence of the right to a jury trial "lies in its insistence that a body of lay[persons] not permanently attached to the sovereign participate along with the judge in the factfinding necessitated by a lawsuit." *Parklane Hosiery Co., Inc., v. Shore*, 439 U.S. 322, 348-349 (1979). *See also, Duncan v.*

*Louisiana*, 419 U.S. 522, 530 (1975)(recognizing that "the purpose of a jury is to guard against the exercise of arbitrary" power by the sovereign).

The constitutional mandates of the Seventh Amendment regarding the separation of judge-jury relations into pre-verdict and post-verdict motions in a jury trial have been delicately set out and balanced in Rule 50 of the Federal Rules of Civil Procedure. Rule 50 provides a judge with an opportunity to decide pre-verdict legal questions raised by a motion for judgment as a matter of law before the case is submitted to the jury and a post-verdict motion after the jury has considered the case. As to pre-verdict motions, Rule 50(a) (2) provides in pertinent part that: "A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury." With respect to post-verdict motions, Rule 50(b) provides for a renewal of the motion for judgment as a matter of law when the initial motion for judgment as a matter of law is denied under Rule 50(a)(2). In pertinent part, Rule 50(b) states that: "If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." Therefore, it is clear beyond cavil now that a trial judge has the authority under both the Seventh Amendment and Rule 50 to oversee · · at the appropriate time · · the reasonableness or unreasonableness of matters submitted to and considered by a jury through the exercise of the trial judge's authority to review the adequacy or sufficiency of evidence in support of a theory of liability or case

submitted to a civil jury for a verdict. See, *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944)("It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. [citations omitted]. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable").

The Seventh Amendment, Rule 50 and the consistent precedents of this Court make clear that after the case is submitted to the jury for consideration, the trial judge is without authority to influence, interfere, or usurp the province of the jury in its search for the truth or determination of the facts in a case. *Compare, Scott v. Lloyd* 34 U.S. 418 (1835)(Marshall, CJ)("The court is thus asked to usurp the province of the jury, and to decide on the sufficiency of the testimony, in violation of the well established principle, that the law is referred to the

court, the fact to the jury. The court did not err in refusing to give this instruction"), *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944) and *Anderson v. Libby Lobby, Inc.*, 477 U.S. 242,255 (1986)(recognizing the separation of the province of a trial judge and a jury by permitting no breach regarding the protected jury work of making "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts...." Accord, *Reeves v. Sanderson*, 530, U.S. at 147.

However, in the instant case, the uniquely[6] federal-local courts of the District of Columbia have made a radical departure from the mandatory delicate balanced judge-jury relations of the Seventh Amendment and Rule 50 by usurping · · and sanctioning the usurpation of · · the province of the jury after Petitioner's case had been submitted to the jury for verdict. These judicial decisions of the federal-local courts have so far departed from the accepted and usual balanced course of separation of functioning of a judge and the jury in a judicial proceeding, and conflict so deeply with the settled precedents of this Court, and

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[6] *Cf., Capital Traction Co., v. Hof*, 174 U.S. 1,5 (1899)("It is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or criminal cases, are applicable to the District of Columbia") and *Pernell v. Southall Realty*, 416 U.S. 363, (1974)("Like other provisions of the Bill of Rights, [the Seventh Amendment] is fully applicable to courts established by Congress in the District of Columbia").

the expected process protected by the Seventh Amendment, and mandated by Rule 50 in a civil jury trial, as to cry out for the supervisory exercise of this Court's supreme judicial power under Article III. *Cf.*, *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225(1946)("It follows that we cannot sanction the method by which the jury panel was formed in this case....That conclusion requires us to reverse the judgment below in the exercise of our power of supervision over the administration of justice in the federal courts").

Without a doubt, under the guise of a so-called "curative instruction", the trial court invaded the protected province of the jury after the case was submitted to it. *Compare* Rule 50(a)(2)("A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury") and Rule 50(b)("If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion"). The District of Columbia Court of Appeals recognized this invasion of the jury's province by a so-called "curative instruction" as the central and focused issue on appeal as follows:

> The sole question on appeal is whether the trial court erred in giving a curative instructive that removed from the jury's consideration a possible theory of the anesthesiologists' negligence. (App.4a).

Further, the District of Columbia Court of Appeals recognized that the trial court's so-called "curative instruction" was peremptory or dispositive in nature as follows:

> One might also read the trial court's curative instruction as a partially directed verdict (a partial judgment as a matter of law): it instructed the jury not to find liability based on the physicians' acts before the hematoma was released.... (App. 21a).

Moreover, the District of Columbia Court of Appeals fully recognized that the issue surrounding the trial court's giving of the peremptory or dispositive instruction after the case was submitted to the jury was "an intensely factual one, requiring us to discuss the evidence in considerable detail." (App.5a).

In addition, with full knowledge that the trial judge so-called "curative instruction" had intruded in the province of the jury, the District of Columbia Court of Appeals recognized both the potential harm to Petitioner's case, and the appropriate remedy for such harm, that would be caused and required as a result of an adverse finding regarding the trial court giving of the so-called "curative instruction" to the jury after the case had been submitted to it. Concerning liability the Court of Appeals stated as follows:

> If there was adequate evidence, viewed in the light most favorable to appellant (the non-moving party), for a reasonable jury

> to conclude that the anesthesiologists breached the standard of care based on their failure to secure baker's airway before the release of the hematoma, the instruction should not have been given. (App. 21a-22a).

Finally, concerning the necessary remedy for the trial court's invasion of the jury's province, the Court of Appeals stated as follows:

> A finding in appellant's favor on the substantive underlying issue could not be harmless error and would require a new trial. (App.22a).

As indicated in the above statements from the Court of Appeals' decision, which affirmed the trial court's invasion of the province of the jury with its so-called "curative instruction", the Court of Appeals goes astray for the same reason as the trial court, by it failure to appreciate the mandates and teachings of the Seventh Amendment, Rule 50 and the Seventh Amendment precedents of this Court regarding the express and implied prohibitions imposed on both the trial court and the court of appeals against invading or usurping the province of the jury after the case has been submitted to the jury. *See, Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944)("It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences"). Similarly, to the misapprehension of the

trial judge, the Court of Appeals mistakenly thought that after the case had been submitted to the jury, and before the filing of a proper Rule 50(b) motion for judgment as a matter of law, it was constitutionally permissible for the trial court to undertake or conduct a dual or parallel fact finding mission, as a co-equal trier of fact, while the jury was also in deliberation, performing within its province as the fact finder, as guaranteed under the Seventh Amendment.

The actual language of the Court of Appeals is illustrative of its misapprehensions regarding the determination of jury matters such as credibility determinations of the lay and expert witnesses, the weight to be given the documentary and testimonial evidence in the record at trial, the reasonable, necessary and legitimate inferences to be drawn from the evidence and a determination of the facts. Equally as important, the Court of Appeals demonstrated major confusion regarding the timing or the permissible point in a jury trial when the trial judge is permitted to consider and decide legal questions raised by a defense requested dispositive instruction or motion for judgment as a matter of law. *See Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944). Without repeating the previous mentioned acknowledgments of the Court of Appeals regarding the dispute amongst the experts for the parties at trial regarding "when surgical procedures became necessary" in the care of decedent (App.5a), or the indisputable reality that the issue raised at trial and on appeal was "an intensely factual one" requiring a discussion of "the evidence in considerable detail, the statements of the Court of Appeals are illustrative of

the improper usurping of the jury's province in contravention of Rule 50 and this Court teachings in *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. at 35.

Despite Rule 50(a) express timing mandate that the making of a motion for judgment as a matter of law occurs "before the case is submitted to the jury," and Rule 50(b) express timing mandate that if the Rule 50(a) motion is denied, "the court is considered to have submitted the action to the jury", the Court of Appeals ignored Rule 50 and mistakenly sanctioned the consideration of the sufficiency of the evidence while the jury was actually deliberating and considering the case as follows:

> To reiterate, the question we must decide is whether appellant presented sufficient evidence to permit a reasonable jury to conclude that Dr. Begin or Dr. Fitzpatrick breached a duty of care to Baker before Dr. Kowalski released the hematoma. (App.22a).
>
> * * *
>
> The issue thus boils down to whether adequate evidence existed to permit a jury to conclude not simply that Baker's airway was narrowing, but that her oxygen saturation levels were dangerously low by the time Dr. Kowalski released the hematoma. (App. 27a)

Further, despite the consistent teachings of this Court regarding the separation of the function of the judge and the jury, as set forth in, among others, *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944) and Anderson v. Libby Lobby, Inc., 477 U.S. 242,255 (1986), the Court of Appeals improperly sanctioned the usurping of the jury's province while the jury was actually deliberating and considering the case as follows:

> The factual question is whether Dr. Begin and Dr. Fitzpatrick deviated from that standard because they were unable to maintain Baker's oxygen saturation levels above 90% using the bag. If that was so, and Baker's levels dropped dangerously below 90% in the (roughly fifteen-minute) period before Dr. Kowalski released her hematoma, then the anesthesiologists were obliged to try to establish baker's airway by other, more invasive means - e.g., by intubation (which would have been difficult at best in Baker's case) or jet ventilation (as Dr. Sheren opined). (App.24a)
>
> * * *
>
> The parties differ on when Baker's condition became an emergency in this sense, and the experts are of little help because it is a largely factual matter.
>
> * * *

> The sole piece of evidence that appellant cites to support her theory that Baker was receiving inadequate oxygen when Dr. Kowalski arrived at her bedside in his post-operation note. According to that note, Baker's oxygenation levels were in the 70%-80% range when Dr. Kowalski released her hematoma.
>
> * * *
>
> We conclude that a reasonable jury could not have relied on Dr. Kowalski's progress note to discount the abundant evidence that Baker's condition destabilized only when Dr. Kowalski released the hematoma, not before. The trial court's curative instruction, which essentially removed that issue from the jury's consideration, therefore, was not erroneous. (App.29a).

As the above references to the decision of the Court of Appeals indicate, the Court of Appeals misapprehended the role not only of the trial judge after the case had been submitted, but its role to "decide whether there are genuine issues of material fact to be decided by the jury" and not to decide a disputed issue submitted to the jury "as a fact finder." See, Warren v. Medlantic Health Group, Inc., et al, 936 A. 2d 733, 737 (D.C. 2007), quoting LaPrade v. Rosinsky, 882 A. 2d 192 (D.C.2005). *See also, Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944)("It is the jury, not the court, which is the fact-finding body"). Further, the Court of Appeals

misunderstood the totality of Baker's record evidence and the fact that a prima facie case of medical malpractice had been established with the aid of a medical expert (Dr. Sheren), as well as, favorable testimony from the defense experts that were in fact submitted to the jury for consideration during its deliberations and fact-finding. *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. at 35 (Recognizing that the jury, not the judge "weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts"). Thus, the Court of Appeals erroneously proceeded in its opinion to act as fact-finders by not only listing the reasons that it was not apparently "persuaded" with Baker's factual presentation, but acknowledging that the primary issue presented on appeal was "intensely factual". *See, Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. at 35 ("Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case"). *See also, Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 555 (1990)("Nothing in the record indicates that the court reached the only reasonable conclusion or that a jury could not have found the facts differently and entered a different verdict. As we have long recognized, a jury and a judge can draw different conclusions from the same evidence. *See, e.g., Railroad CO. v. Stout*, 17 Wall, 657,664 (1874)."

This was improper and an unconstitutional sanctioning of the usurpation of the jury's province by the Court of Appeals. Without listing every reasons offered by the Court of Appeals as to why it was not "persuaded" that Dr. Kowalski's note was not worthy of credence, Petitioner will mention a few in order to further illustrate the Court of Appeals' sanctioning of an improper and unconstitutional invasion of the jury's province in its March 16, 2010, opinion.

It is now well settled that when a case such as Petitioner's case turns on disputed and controverted facts and the credibility of the witnesses, "the case is properly for the jury." *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944). *See also, Warren v. Medlantic Health Group, Inc., et al*, 936 A. 2d 733, 737 (D.C. 2007). The Court of Appeals began its list of reasons that it was not persuaded by Dr. Kowalski's factual note with "neither appellant nor anyone else mentioned the statement in Dr. Kowalski's progress note in the trial court." (App.28a). This statement by the Court of Appeals overlooks the fact that Petitioner submitted Dr. Kowalski's note into evidence. Moreover, it was Petitioner, not the defendants, who called Dr. Kowalski as a witness during the trial. Likewise, it was Petitioner, and not the defendants, who offered Dr. Kowalski's note into evidence. Moreover, it was Dr. Kowalski who repeatedly referenced his note as his best recollection of the events surrounding his medical interactions with Ms. Baker on May 19, 2000. Therefore, the jury was in the best position to judge Dr. Kowalski's credibility and to give appropriate weight to his progress note's bearing on the believability of the other treating

healthcare providers and medical experts that were before the court. Petitioner called Dr. Kowalski to authenticate his note and to help the jury see and understand Dr. Kowalski's role in the treatment of decedent and allow him to corroborate his assessment of the reality of Ms. Baker's medical condition when he arrived at her bedside with Drs. Begin and Fitzpatrick already there. Since the issue of Baker's experiencing dangerously "difficult airway" while under the care of Drs. Begin and Fitzpatrick, has support in the record from the totality of Dr. Kowalski's evidence, Petitioner's expert witness, Dr. Sheren, provided the record for the jury that Drs. Begin and Fitzpatrick were not acting consistent with the national standard of care by failing to attempt to establish Baker's airway by intubation or jet ventilation. Therefore, the jury was free to credit the totality of Dr. Kowalski's medical evidence, including his progress "note" and to disbelieve "Dr. Begin, Dr. Fitzpatrick and Nurse Quzon's testimony that Baker's oxygen saturation levels remained above 90% until after Dr. Kowalski released the hematoma." *See, Reeves v. Sanderson*, 530, U.S. at 147 ("The fact finder's disbelief of the reasons put forward by the defendant (particular if disbelief is accompanied by a suspicion or mendacity) may, together with the elements of the prima facie case, suffice....").

Contrary to the Court of Appeals' intimation in its opinion, Dr. Kowalski confirmed that his note was his best memory of the events of May 19, 2000. Therefore, it was not necessary for him to go line by line or word by word of his note. However, for purposes of jury persuasion, it was of utmost importance that he

take the stand under oath and allow the jury to hear him stand by his note and to be cross-examined by the Defendants if there were anything that they wanted to challenge him or impeach him with regarding his progress note. Therefore, it was an invasion of the jury's province and a violation of Rule 50 and the Seventh Amendment for the Court of Appeals to draw the adverse factual inference or conclusion that Dr. Kowalski's statement in his progress note that Baker's oxygenation levels were in the 70%-80% range before he released her hematoma was an "arguable erroneous statement." (App.28a, fn. 23).

Contrary to the Court of Appeals' further factual conclusion, it was a factual question for the jury, and not the trial judge or the Court of Appeals, as to whether "the persons primarily responsible for keeping Baker oxygenated, the anesthesiologists and Nurse Quzon were likely to have been paying closer attention to her oxygen saturation numbers than Dr. Kowalski was, over a longer period of time." (App.29a,fn25). *Compare, Tiller v. Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 67-68 (1943)("Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury") and *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944)("It is the jury, not the court, which is the fact-finding body"). Finally, contrary to the Court of Appeals' conclusion "that a reasonable jury could not have relied on Dr. Kowalski's progress note to discount the abundant evidence that Baker's condition destabilized only when Dr. Kowalski released the hematoma, not before", when the totality of Petitioner's

record evidence, including the expert testimony relied on by Baker, a reasonable jury after viewing all reasonable inferences in Baker's favor, as the non-movant, could clearly find that the care provided to Baker by Drs. Begin and Fitzpatrick fell below the standard of care, caused her harm and awarded damages. *See, Tiller v. Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 67-68 (1943), *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944) and *Warren v. Medlantic Health Group, Inc., et* al, 936 A. 2d 733, 737 (D.C. 2007). Therefore, contrary to the Court of Appeals' conclusion, the issue of whether Baker's condition destabilized before or after Dr. Kowalski's released the hematoma was a factual issue for the jury and not the Court of Appeals nor the trial court. *See, Tiller v. Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 67-68 (1943), *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944) and *Warren v. Medlantic Health Group, Inc., et* al, 936 A. 2d 733, 737 (D.C. 2007). However well-intentioned the court of appeals or the trial judge might have been, the usurpation of the jury's province as occurred after the case had been submitted to the jury for verdict, and prior to its verdict, had the inevitable effect of undermining, if not destroying the basic, fundamental, substantive essence of a jury trial as guaranteed by the Seventh Amendment. *See, Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944)("It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that

which it considers most reasonable. [citations omitted]. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable"). *See also, Jacobs v. New York*, 315 U.S. 752, 753 (1942)("The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts". Further see, *Tiller v. Atlantic Coast Line Railroad Co.*, 318 U.S. 54 (1943)("No case is to be withheld from a jury on any theory of assumption of risk; and questions of negligence should under proper charge from the court be submitted to the jury for their determination. Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' *Jones v. East Tennessee, Vir, and & Ga. RR Co.*, 128 U.S. 443, 445. Or as we have put it on another occasion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury [footnote omitted]."

Moreover, the Seventh Amendment precedents of this Court have never permitted undue influence or

interference by a trial judge under any guise that actually interrupts or, and interferes with, the protected fact-finding work of the jury, before or after the case had been submitted to the jury for its verdict. *See*, *Burdell v. Denig*, 92 U.S. 716, 723 (1876)("The court, therefore, in telling the jury peremptorily, on this testimony, that the license to Lowe did not authorize him to use the Singer machine with a feeding device operating upon the principle and plan of that patented by Wilson, took away from the jury the right to weigh that testimony"); *Starr v. United States*, 153 U.S. 614,626 (1894)("It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling"); *Gunning v. Cooley*, 281 U.S. 90, (1930)("Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury").

Under such precedents, the decision of the Court of Appeals below absolutely cannot be sanctioned under either Rule 50 or the Seventh Amendment. In fact, the usurpation of the jury's province below raises an important constitutional question regarding the proper timing and manner for a juror, trial counsel, the trial judge and the appellate court to protect both the constitutional rights and privileges of: (1) fellow citizens actually performing their civil duty by sitting as a constitutionally formed jury, and (2) one's client who expects the common-law fact-finding province of

the jury to be respected and not usurped in violation of the Seventh Amendment to the Constitution of the United States. *See, Greenleaf v. Birth*, 34 U.S. 292, 299 (1835)("Where there is no evidence tending to prove a particular fact, the courts are bound so to instruct the jury, when requested: but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have").

When the trial judge violates constitutional rights and privileges of the jury performing its work and exercising the power reserved to and retained by the people, and the appeals court sanctioned and further violates such fundamental rights by reexamining the same evidence submitted to the jury in order to make a different factual determination than a reasonable jury acting within its province could have made, it becomes emphatically the province and duty of this Court as the supreme judicial authority to state what the Seventh Amendment protects and prohibits when a conflict arises regarding judicial invasion or intrusion into the province of the jury under the circumstances. *See, Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury should be scrutinized with the utmost care." *Accord, Chauffers v. Terry, 492 U.S. 558, 565(1990). Cf., Marbury v. Madison*, 5 U.S. 137 (1803)("This is the very essence of judicial duty").

While recognizing the clearly and "intensely factual" issue usurped from the province of the jury by

the trial court, the District of Columbia Court of Appeals, in its affirmance of the trial court's usurpation, has sanctioned the violation of the substance and purpose of petitioner's right to a jury trial under the Seventh Amendment. In fact, the Court of Appeals was not deciding mere legal questions improperly raised below, but the Court of Appeals has improperly decided the very "intensely factual" matters which had been submitted to the province of the jury below. In short, in violation of Petitioner's constitutional right to a jury trial against the two anesthesiologists, the Court of Appeals has not only approved the trial court's usurping action, but has itself acted as the re-trier of fact in its memorandum opinion and judgment affirming the trial court. In reality, the Court of Appeals has expressly stated and done that which the plain meaning of Rule 50 and the text of the Seventh Amendment prohibits - - reexamining fact tried by a jury. Thus, this case calls for an exercise of this Court's unique and supreme supervisory judicial power over judicial proceedings because of the inevitable effect that the unconstitutional usurpation below have created and sanctioned.

B. The Decision Below Raises Not Only Significant and Recurring Serious Problems for Judge-Jury Relations and Juror Offending Judicial Administration, But Suggests the Need for Guidance From This Court As to the Wisdom of Allowing a Case to Continue With the Jury Without Undue Dispositive Interruption of the Jury's Fact-finding Deliberation by the Trial

Court When There is Reasonable Room for a Difference of Opinion Regarding the Evidence

The right to trial by jury is important to the birth and development of our country into a constitutional nation. Accordingly, when judicial decisions run afoul of the fundamental right to trial by jury, certiorari is warranted in order to instruct judges in the instant case below, as well as, in future cases, of the constitutional and judicially wise course to be followed in order to protect the constitutional right to a trial by jury while leaving the judge free, should he or she later determine after the jury has concluded its work, that the verdict must fall, to enter judgment as a matter of law, and the work of the appellate court or this Court would not necessarily require another trial on the merits. While this principle and Rule 50's mandates were not followed in the instant case below, it is well established by precedents in the District of Columbia that during a jury trial, "if there is room for a difference of opinion, the wise course is for the trial judge to allow the case to go to the jury.' The judge is then free, should he later determine that the verdict must fall, to enter judgment notwithstanding the verdict, and our action on appeal could not necessitate another trial." *Seganish v. D. C. Safeway Stores, Inc.*, 132 U.S. App. D.C. 117, 122, 406 F. 2d 653 (D.C. Cir.1968). *Accord, Corley v. BP Oil Corp.*, 402 A. 2d 1258 (D.C. 1979), *Johnson v. Weinberg*, 434 A. 2d 404 (D.C. 1981) and *Schecter v. Merchants Home Delivery, Inc.*, 892 A. 2d 415 (D.C. 2006) ("If there is room for a difference of opinion, the wise course is for the trial judge to allow the case to go to the jury"). *Compare*,

Rule 50(a)(2) of the Superior Court Rules of Civil Procedure, providing in pertinent parts as follows: "Motions for judgment as a matter of law may be made at any time before submission of the case to the jury" with Rule 50(b), providing in pertinent parts as follows: "If, for any reason, the Court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the Court is considered to have submitted the action to the jury subject to the Court's later deciding the legal questions raised by the motion." Cf. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654,659 (1935)("The verdict for the plaintiff was taken pending the court's rulings on the motions and subject to those rulings").

The practice of granting a direction of a judgment as a matter of law, whether it is done directly or indirectly, "requiring the jury to express assent to a verdict they did not reach by their own deliberations," has been long known to serve no useful purpose and to "give offense to the members of the jury." *See*, Federal Rules of Civil Procedure, Rule 50, Notes of Advisory Committee on 1963 amendments. Subdivision (a). *See also*, Blume, Origin and Development of the Directed Verdict, 48 Mich. L. Rev. 555, 582-85, 589-90 (1950). Cf, *Dairy Queen, Inc., v. Wood*, 369 U.S. 469, 477-78 (1962)("But the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings"). Calling the dispositive nature of the trial court's usurpation of the jury's province a "curative instruction", a peremptory instruction or a partial judgment as a matter of law, does not change the dispositive effect of depriving Petitioner of a trial by

jury below. The inevitable effect of the trial judge's supplemental instruction aborted the jury's consideration of liability against the two anesthesiologists as a matter of law. *Cf. Cool v. United States*, 409 U.S. 100, 102-03 (1972)("The clear implication of this instruction was that the jury should disregard [a witness'] testimony unless it was "convinced it is true beyond a reasonable doubt.' Such an instruction places an improper burden on the defense and allows the jury to convict despite its failure to find guilt beyond a reasonable doubt. [footnote omitted]").

In order to correct the unjust result achieved below, and to prevent another usurpation of the province of the jury under the Seventh Amendment, this Court should give Rule 50 guidance to the judges below, and future judges, that in order to satisfy the delicate balancing required by the Constitution between an examination and determination of the fact by a jury, and a determination as to the law by the judge, this Court should rule that the judicial wise course requires judges to respect and acknowledge the separation of functioning between judge and jury in jury trials. While the Court of Appeals improperly reexamined in considerable detail, the disputed factual matters in evidence before the jury, it failed to fully appreciate the significant of the usurpation of the jury's province caused by the trial judge. Ultimately, however, the Court of Appeals' sanctioning of the usurpation of the jury province led it astray in making further flawed fact-finding regarding the critical moment of the negligence of the two anesthesiologists that a reasonable jury, based on the record evidence,

including but not limited to the progress note of Dr. Kowalski, could have reasonably determine violated the national standard of care in their treatment of decedent. By requiring the trial court to follow the Rule 50 wise course in jury trials, the intensely factual issue regarding breach of the standard of care by two anesthesiologists would have been resolved by the jury, without undue interference from the trial judge and a new trial would not have been necessary on this disputed issue. The usurping actions of the Superior Court of the District of Columbia, and its sanctioning by the District of Columbia Court of Appeals below, should be reviewed and found to be in derogation of the Seventh Amendment, Rule 38 and Rule 50 of the Federal Rules of Civil Procedure.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the memorandum opinion and judgment of the District of Columbia Court of Appeals.

Respectfully submitted,

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August 12, 2010

APPENDIX A

# District of Columbia Court of Appeals

No. 07-cv-884

PORTIA BAKER ANDREWS,

Appellant,

CAM8637-03

v.

ASSOCIATED ANESTHESIOLOGISTS SERVICES, P.C.,

Appellee.

BEFORE: Washington, Chief Judge; *Ruiz, Reid, *Glickman, Kramer, Fisher, Blackburne-Rigsby, *Thompson, and Oberly, Associate Judges.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that

no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

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## APPENDIX B

**District of Columbia Court of Appeals**

No. 07-cv-884

PORTIA BAKER ANDREWS,
APPELLANT,

v. No. CAM 8637-03

ASSOCIATED ANESTHESIOLOGISTS SERVICES, P.C.,
APPELLEE.

Appeal from the Superior Court of the
District of Columbia
Civil Division

(Hon. Gerald I. Fisher, Trial Judge)

(Argued December 3, 2008 Decided March 16, 2010)

Before RUIZ, GLICKMAN, and THOMPSON, Associate Judges.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: This is a medical malpractice case in which the jury returned a defense verdict. To briefly summarize the case: the patient, Ms. Alma L. Baker, apparently bled from the site of a routine surgery on her carotid artery. The blood pooled in her neck and compressed her trachea, effectively choking

her. The attending anesthesiologists administered oxygen, which appeared sufficient for a time to allow the patient to continue to breathe. An attending surgeon made an incision in her neck to drain the blood, which all of the doctors thought would release the pool and relieve the patient's breathing distress. Instead, her breathing grew rapidly more difficult, and the surgeon performed an emergency cricothyroidotomy, a procedure to establish a breathing tube from the outside of the patient's throat into her trachea. The cricothyroidotomy was unsuccessful, and the patient suffered brain damage and eventually died.

The sole question on appeal is whether the trial court erred in giving a curative instruction that removed from the jury's consideration a possible theory of the anesthesiologists' negligence. After reviewing the testimony of the parties' experts on the standard of care governing the anesthesiologists' actions, the court instructed the jury that "there is no issue in this case that [the anesthesiologists] deviated from the standard of care by failing to preserve a[n] airway before the hematoma was released by [the attending surgeon]."

Concerning the standard of care relevant to that time frame, the plaintiff's expert and the defendants' experts agreed on the basic principles:

> (1) Establishing the patient's airway is paramount and the first job of the anesthesiologist, because anoxia can cause serious

brain damage quite quickly, but

(2) As long as the plaintiff is receiving adequate oxygen, less invasive procedures are preferred, and

(3) Surgical procedures to establish a breathing tube through the patient's throat are the most invasive options and should be undertaken only as a last resort.

The expert differed on when surgical procedures became necessary under these principles in the circumstances of this case. The plaintiff's expert effectively assumed that the patient reached a critical moment before the surgeon released the hematoma, while the defendants' experts assumed that the critical moment occurred only afterward.

The issue is an intensely factual one, requiring us to discuss the evidence in considerable detail. In the end, we conclude that there was insufficient evidence from which a reasonable jury could have found the anesthesiologists negligent before the surgeon released the hematoma. We therefore find no error in the trial court's ruling and affirm the judgment on appeal.

## I. Factual Background

On May 19, 2000, Alma Baker[1] had a left internal carotid endarterectomy at the Washington Hospital Center. The procedure removed plaque from her left carotid artery to reduce her risk of a stroke. Because the surgery required general anesthesia, Baker was evaluated beforehand by Dr. Laura Fitzpatrick, who would be the anesthesiologist present during the surgery. Dr. Fitzpatrick noted that Baker would be a potentially difficult patient for her because her airway was partially obstructed by her tongue and other portions of her anatomy. Indeed, during the surgery, Dr. Fitzpatrick found it difficult to pass an oxygen tube down Baker's trachea, though with assistance she succeeded in doing so on the second attempt. Once the airway was established , Dr. Bruce Smith, a vascular surgeon, performed the endarterectomy with the aid of a third-year surgical resident, Dr. Christopher Kowalski. The surgery ended at approximately 1:44 p.m. Baker was wheeled to the Post-Anesthesia Care Unit, or PACU, at 2:15 p.m. At that time, she was awake and responding to questions. Dr. Fitzpatrick informed Dr. Eileen Begin,[2] the attending anesthesiologist in the PACU, of the

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[1]Appellant, Baker's daughter, is the personal representative of her estate.

[2] Appellee Associated Anesthesiologists Services stipulated that it was Dr. Begin's and Dr. Fitzpatrick's employer, and that the two physicians were acting within the scope of their employment at all relevant times. Appellee is the only remaining party in the case.

problems she had encountered intubating Baker for the surgery.

At 2:50 p.m., Dr. Fitzpatrick noted a slight swelling on the left side of Baker's neck. Bleeding from a carotid endarterectomy may cause such sweeling. As soon became clear, Baker was developing a hematoma, a collection of pooling of blood that was beginning to press against Baker's windpipe. The hematoma would eventually cut off her oxygen flow.

Oxygen saturation, expressed in terms of a percentage, is a measure of the amount of oxygen carried in the blood's hemoglobin. A number above 90% is within normal limis, 85%-90% is "borderline," and "below 85% would be cause for concern." When the swelling began, Baker's oxygen saturation was quite satisfactory, around 95%-96%. However, by approximately 3:05 p.m., Baker began to be anxious, an early sign of breathing difficulty. Dr. Begin noticed the difficulty and asked Dr. Fitzpatrick to help her in case it became necessary to reintubate Baker. Dr. Begin also obtained the emergency airway cart, which had equipment to help the doctors secure a patient's airway, and asked a nurse to call the surgical staff to come evaluate Baker's condition.

At around 3:20 p.m., Baker started manifesting "stridor," a sound characteristic of a potentially serious upper airway obstruction. Dr. Begin and Dr. Fitzpatrick began administering oxygen via an "Ambu Bag," a face mask that transmitted 100% oxygen. Baker's oxygen saturation levels initially remained relatively good, in the 90% range.

At approximately 3:30 pm., in response to the request for surgical staff, Dr. Kowalski arrived and joined Dr. Begin and Dr. Fitzgerald at Baker's bedside. He asked the nursing staff to page Dr. Smith and issue a "code yellow" - a summons to the emergency trauma team. After a short consultation with Dr. Begin and Dr. Fitzpatrick, Dr. Kowalski made an incision to allow the pooling blood to drain. All three doctors reasonably expected the incision to relieve Baker's respiratory distress.

An important question, to which we shall return below, is the status of Baker's oxygen saturation levels after Dr. Kowalski arrived but before he released the hematoma. Dr. Begin, Dr. Fitzpatrick, and attending Nurse Lucille Quzon[3] all testified that Baker's oxygen saturation levels remained at or above 90% until Dr. Kowalski released the hematoma (after which the levels dropped precipitously. Nurse Quzon's monitoring chart reports that Baker's oxygen saturation level was still at 95% at 3:15 p.m., the last time for which there is an entry. Nurse Quzon's progress note, which she prepared shortly after the event at 4:15 p.m., states that Baker's oxygen saturation levels were stillin the 93-90% range at the time Dr. Kowalski intervened to release the hematoma (approximately 3:30 to 3:55 p.m.).[4] Dr. Kowalski did

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[3] Nurse Quzon's last name had changed to Fain by the time of trial.

[4]Dr. Begin's progress notes, prepared at 4:00 p.m., state that Baker's oxygen saturation dropped "rapidly" from 94% into the 70% range but do not indicated when that occurred

not testify otherwise; however, his progress note (prepared at 6:10 p.m.) appears to state that Baker's oxygen saturation levels had declined to the 70%-80% range by the time he arrived. Dr. Kowalski was not asked about that statement at trial, however.[5] In the trial court appellant did not dispute the testimony that Baker's oxygen saturation levels remained above 90% until her hematoma was released. It was appellant, for example, who elicited Nurse Quzon's testimony and asked her to read her progress note into the record.

To the surprise of the doctors attending her, Baker's condition deteriorated suddenly and rapidly after Dr. Kowalski released the hematoma.[6] Moreover, it was impossible to intubate Baker because by this time she was clenching her mouth tightly shut. As. Dr.

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in relation to the release of the hematoma. At trial, Dr. Begin clarified that the levels dropped below 90% "after the release of the hematoma." Dr. Begin agreed that Baker was "start[ing] to have more difficulty breathing" before Dr. Kowalski made his incision.

[5]Dr. Kowalski declined to vouch for the accuracy of the times in his progress notes. As he explained, "I didn't time my note during the code as some of the people had," his notes were "written in recollection of the events," and the times "could be off five, ten minutes."

[6]The record is not entirely clear as to why the incision failed. One defense expert suggested that Baker's respiratory distress might have been caused by blood "getting into the tissues and causing inflammation in the tissues in the throat which would make it very difficult to ventilate or intubate the patient."

Begin explained, "we just couldn't open her mouth to try to intubate, put in an oral airway, to put a laryngeal mask airway, to put in anything." Dr. Kowalski quickly moved to perform a cricothyroidotomy - cutting through the cricothyroid membrane and thyroid shield to create a passage to the trachea so that air could enter Baker's lungs. After he placed the tube, Dr. Kowalski listened to Baker's chest dn believed he could hear breath sounds in her left lung, meaning the tube was only in the left stem bronchus. Dr. Begin, similarly, heard some air sounds but could not tell if air was being delivered effectively to Baker's lungs. As it turned out, Dr. Kowalski had placed the tube through the thyroid cartilage instead of the cricothyroid membrane. Consequently, air was forced into Baker's esophagus, rather than her trachea, meaning no effective airway had been established.

Following the attempted cricothyroidotomy, the doctors rushed Baker back to the operating room. In the operating room, Dr. Rhee (the trauma surgeon who responded to the code yellow call) succeeded in establishing an airway. By then, Baker's heart had stopped, and she was resuscitated. By 3:59 p.m., Baker had returned to full oxygen saturation. Unfortunately, the rally was too late: Baker had suffered permanent brain damage from the deprivation of oxygen.

## II. The Pertinent Expert Testimony at Trial

On the issue before us - whether there was evidence of any violation by the anesthesiologists of the standard of care prior to the time Dr. Kowalski released the hematoma - three expert witnesses

provided pertinent testimony. We must consider the opinions of all three because appellant relies on the defense experts as well as her own.

A. Dr. Sheren

Dr. Loren Sheren testified as the plaintiff's expert. Initially, he appeared to assume that Dr. Begin and Dr. Fitzpatrick merely monitored Baker before Dr. Kowalski arrived, without giving her oxygen. He testified, for example, that "it doesn't appear that there were any direct interventions at that point in time." Dr. Sheren agreed, however, that using the oxygen mask was an appropriate first step and was acceptable so long as it worked to maintain Baker's oxygen saturation at adequate levels (i.e., above 90%). On the opposite assumption, i.e., that sufficient oxygen saturatino levels, were not being maintained, Dr. Sheren opined that the anesthesiologists did not pay "enough attention . . . to maintaining an open airway on Miss Baker," and did not adhere to the national standard of care in managing Baker's airway "during the period of time after she developed the stridor." Specifically, he thought the anesthesiologists

> should have gone right to it, to finding someone that could create a surgical airway, that the chances of passing this breathing tube through the mouth . . . [were] low, that it was highly unlikely to succeed. . . . [T]his is the kind of patient that - that's crying

> out for - for the immediate creation of a surgical airway.

Since there was no way around the physical blockage in Baker's trachea, Dr. Sheren thought Dr. Fitzpatrick and Dr. Begin should have used a procedure called jet ventilation: the introduction of a cannula into Baker's trachea, through which pressurized oxygen could have been forced into her lungs. Dr. Sheren opined that the failure to recognize the need for jet ventilation and to institute it in time was a significant cause of Baker's brain injury: "if a surgical airway had been called for . . . when it became obvious that Miss Baker's oxygenation was deteriorating . . . it's highly likely" her brain injury would have been prevented.[7]

On cross-examination, however, Dr. Sheren acknowledged that he did not know what Baker's oxygen saturation levels were prior to Dr. Kowalski's unsuccessful release of the hematoma, and he conceded that he could *not* say the standard of care was violated before then:

> Q. [I]sn't it a fact, sir[,] that you cannot tell the jury within a reasonable degree of medical certainty that a

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[7]In other words, Dr. Sheren testified, "what was required was an early recognition of the fact that a surgical airway would be required and to obtain assistance from a physician, from a surgeon, [who] was capable of maintaining that surgical airway."

transjet ventilation process should have been put · put into effect prior to the time the hematoma was actually released.

A. I can't tell you minute to minute exactly, you know, what was transpiring at a period of time. Now, certainly jet · insertion of a jet ventilator is a last ditch supportive effort. . . . [I]t's not something that would be done in the absence of an extreme emergency situation.

Q. And it's · from what you can tell from this record, that extreme emergency situation did not occur until after the hematoma was released and the obstruction did not dissipate, and her oxygen saturation levels continued to drop, isn't that true?

A. Again, a lot of things were happening simultaneously here. But sometime around the time that the hematoma was released appears to be when Mrs. Baker . . .

severely desaturated and arrested.

* * *

Q. . . . . The expectation in releasing the hematoma itself was that if you release the hematoma, that would release the obstruction on the airway and would resolve the problems . . ., true?

A. Yes.

Q. And if that happened . . . there would not have been any need for an emergency cricothyridotomy, there would not have been any need to even consider a transjet ventilation procedure, isn't that true?

A. That's correct sir.

* * *

Q. So, on this particular case, as far as utilizing the transjet ventilation system, you would agree with me that if the step was going to be taken, if at all, it was not

> going to be taken until after the hematoma was released and the health care providers determined that the airway obstruction was not being relieved, isn't that true?
>
> A. Yes, assuming that there's someone there that can release the hematoma.
>
> Q. Well, Dr. Kowalski was there and he did, in fact, release[] the hematoma, didn't he.
>
> A. Yes, sir.[8]

B. Dr. Castellanous

Dr. Paul Castellanos, an otolaryngologist called by Dr. Dr. Kowalski (a defendant below though not a party on appeal), did not opine that there had been any deviation from the standard of care. With respect to the issue now before us, Dr. Castellanos agreed on

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[8]Dr. Sheren further conceded that he would have to defer to the doctors at Baker's bedside as to the degree of emergency. Finally, he agreed that he could not opine to a reasonable medical certainty that the outcome would have been any different had Dr. Fitzpatrick and Dr. Begin administered a jet ventilation. He did insist it would have improved Baker's odds, however.

cross-examination that stridor is a sign the patient's airway has been narrowed by roughly 80%, making it necessary to "attempt to secure the airway" in some way. But if the anesthesiologists were maintaining Baker's oxygen saturation above 90% by mask ventilation, he testified, that would have sufficed to avoid "any anoxic injury" until Dr. Kowalski released the hematoma. In addition, Dr. Castellanos opined, Dr. Kowalski's subsequent decision to perform a cricothyroidotomy conformed to the national standard of care. In Dr. Castellanos's opinion, jet ventilation (the alternative procedure favored by Dr. Sheren) "would have been a very bad option"[9] for the anesthesiologists to have pursued because it is "more fraught with risks of hypogenic injuries than [cricothyroidotomy] is." Establishment of a surgical

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[9]Dr. Castellanos testified as follows:

> Q. And you don't take a position in this case based upon your education, knowledge, and experience that . . . either of these anesthesiologists should have used some type of jet ventilation procedure to assert a[n] airway prior to that time when they were adequately oxygenating this patient with mask ventilation, isn't that true?
>
> * * *
>
> A. I can be even more positive than that. I think it would have been a very bad option and probably would have resulted in at least subcutaneous emphysema if not pneumothorax in the mediastinum.

airway was safer because "[i]f the airway was difficult to find with a scapel, it would be extremely difficult to find with a needle."

C. Dr. Harris

The third expert witness, an anesthesiologist called by appellee, was Dr. Andrew Harris. His opinion, based on the assumption that "until shortly after the hematoma was released [Baker's] oxygen saturation levels were somewhere between 90 and 93 or 94." was that Dr. Begin and Dr. Fitzpatrick acted appropriately and within the standard of care by merely providing extra oxygen to Baker through a mask and bag. Dr. Harris further testified that until the hematoma was released and Baker's vital signs deteriorated rapidly, it was not incumbent on the anesthesiologists to call for a trauma surgeon. Rather, "they needed to get a surgeon there who could - could evacuate the hematoma" (which they did).

Dr. Harris also opined that releasing the hematoma was an appropriate first step to take: "a lot of [time] . . . the airway compromise for stridor will be caused by this - by this expanding blood clot. . . . So the first thing to do is release that clot because almost all the time that's going to solve the problem." After that procedure failed to relieve Baker, two options were available. First, an anesthesiologist without other options reasonably could elect to perform a jet ventilation. "But in the setting where you have a surgeon right there then it makes no sense to try that," Dr. Harris opined, because Baker's neck anatomy was

known to be abnormal.[10] Whereas the anesthesiologist would be passing the needle into the neck blindly, a surgeon seeking to establish an airway by cutting through the cricothyroid memberane would be able to observe the structures through which he was cutting. Consequently, the cricothyroidotomy "would have a much higher likelihood of success in this situation."

On cross-examination, Dr. Harris agreed that adequate oxygenation had to be maintained at all times, including while trying to alleviate the hematoma. And he conceded that if Baker had been intubated at 3:20 p.m. - when her stridor first manifested itself, but before her respiratory distress had become acute - she probably would have survived without serious injuries.[11] On redirect, Dr. Harris reaffirmed his opinion that the anesthesiologists' use of the oxygen mask, rather than a more invasive procedure, conformed to the standard of care as long as the patient was getting enough oxygen.[12]

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[10]Dr. Harris further pointed out that jet ventilation, while a temporary solution, was only a stopgap because it did not allow for *expiration* - the exhalation of carbon dioxide.

[11]Dr. Harris also was impeached with a medical text that suggested jet ventilation was safer and more efficacious than cricothyroidotomy for most patients. He suggested, however, that the text, on "Obstetrics and Anesthesia," was not authoritative in the circumstances of head or neck surgery.

[12]The testimony was as follows:

Q. . . . . Do you have an opinion within a reasonable

## III. Appellant's Closing Argument and the "Curative" Instruction

In her closing argument, appellant asserted that by 3:10 p.m., despite "objective signs that [Baker's] airway ha[d], in fact, been compromised . . . [n]othing was done to secure the airway." By 3:20 p.m., when the stridor was noted by Dr. Begin, Baker "only had 20 percent of the normal air flow in her airway available to provide oxygen." Invoking Dr. Harris, appellant argued that if the anesthesiologists had properly protected the airway at that time (some fifteen minutes before Dr. Kowalski released the hematoma) there would have been no need for the cricothyroidotomy and

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degree of medical certainty as to whether or not the standard of care required Dr. Begin and/or Fitzpatrick to even attempt to intubate this patient prior to the release of the hematoma as opposed to bagging her with a mask and keeping her oxygen levels up?

A. If they were able to maintain . . . adequate oxygenation levels then that's all you need to do because . . . attempting to do more than that can result in problems. . . . [I]f you're delivering oxygen through a face mask like that and putting it over someon's face . . . if you take it off to do something you're not providing hundred percent oxygen for that point in time.

So the first think you always do is you always try to oxygenate the patient with a bag and a hundred percent oxygen. And if you succeed in that oxygenation then, you know, you hesitate to go further you're doing what you need to do at that moment in time which is just maintaining the oxygenation.

Baker would still be alive. Appellee's counsel twice objected to the suggestions that the anesthesiologists had done nothing to secure or protect the airway; both objections were overruled. Appellant than moved on to argue the other issues in this case.

Appellee countered in its closing argumetn that "[a]ll of the evidence," including the progress notes, confirmed that up until the time Baker's hematome was released by Dr. Kowalski, Baker was getting sufficient oxygen from the anesthesiologists and her oxygen saturation levels were over 90% - and so "there was no rush to try to intubate her" then. Consequently, appellee emphasized, there was no opinion by any expert that Dr. Begin or Dr. Fitzpatrick had deviated from any standard of care prior to the release of the hematoma.

In rebuttal, appellant did not dispute appellee's assertion that the anesthesiologists maintained Baker's oxygen saturation levels above 90% until her hematoma was released.

Following closing arguments, appellee sought a supplemental "curative instruction" because no expert had opined that Dr. Begin or Dr. Fitzpatrick deviated from the standard of care at any time before Dr. Kowalski released Baker's hematoma. In opposition to such an instruction, appellant argued that the presence of stridor demonstrated that Baker's airway had been blocked and compromised "up to possibly 80 percent," and that the doctors "should not [have] wait[ed] 15 minutes for it to become completely blocked before" securing an airway. While appellant conceded that her own expert, Dr. Sheren, "doesn't say" that the "the

negligence here is the failure to preserve the airway at an earlier point in time than the relieving of the hematoma," she argued that "Dr. Harris . . . said you've got to preserve what airway capacity there is."[13] But Dr. Harris, the court observed, did not opine that any particular procedure, such as intubation, was required; rather, he merely stated that *oxygenation* needed to be maintained. Appellant never argued to the court that there was evidence Baker's oxygen saturation levels dropped below 90% before Dr. Kowalski released her hematoma.

Ultimately, after receiving appellant's written opposition and hearing extensive argument on the question, the trial court agreed that a curative instruction was warranted. Rejecting a more restrictive instruction proposed by appellee, the trial court instructed the jury over appellant's objection that "there is no issue in this case that Dr. Fitzpatrick and Dr. Begin deviated from the standard of care by failing to preserve a[n] airway before the hematoma was released by Dr. Kowalski." The instruction was given at 10:30 a.m. on June 27, 2007; the jury deliberated until 1:15 p.m. on the following day before returning a defense verdict.

## IV. Standard of review

In challenging the trial court's curative instruction, appellant suggests that the Court reviews

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[13]Moreover, appellant argued, that basic principle was "within the k[e]n of the average lay person" even absent expert testimony.

whether a trial court should have given a disputed jury instruction for abuse of discretion.[14] One might also read the trial court's curative instruction as a partially directed verdict (a partial judgment as a matter of law): it instructed the jury not to find liability based on the physicians' acts before the hematoma was released because there was insufficient evidence for such a finding. That ruling would be subject to de novo review.[15] Regardless of the standard, our inquiry is the same. If there was adequate evidence, viewed in the light most favorable to appellant (the non-moving party), for a reasonable jury to conclude that the anesthesiologists breached the standard of care based on their failure to secure Baker's airway before the release of the hematoma, the instruction should not have been given.

This is the sole question on appeal. Appellant's remaining issues are whether the error was harmless and whether a new trial should be awarded. A finding in appellant's favor on the substantive underlying issue could not be harmless error and would require a new trial.

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[14] *See, e.g., NCRIC, Inc. V. Columbia Hosp. For Women Med. Ctr., Inc.*, 957 A.2d 890, 898 (D.C. 2008) (reviewing refusal to give instruction for abuse of discretion); *Nelso v. McCreary*, 694 A.2d 897, 901 (D.C. 1997) (same); *Nimetz v. Cappadona*, 596 A.2d 603, 605 (D.C. 1991) (stating that "[a] party is entitled to an instruction on his or her theory of the case if the instruction is supported by the evidence").

[15] *Furline v. Morrison*, 953 A.2d 344, 351 (D.C. 2008).

## V. Analysis

To reiterate, the question we must decide is whether appellant presented sufficient evidence to permit a reasonable jury to conclude that Dr. Begin or Dr. Fitzpatrick breached a duty of care to Baker before Dr. Kowalski released the hematoma. In appellant's view, the anesthesiologists should have maintained Baker's airway more carefully and used "transtracheal jet ventilation or some other effective means of providing oxygen to Mrs. Baker . . . until surgeons could . . . drain the hematomy and create a surgical airway."[16]

Appellee argues that appellant failed to present expert testimony supporting her claim that Dr. Begin and Dr. Fitzpatrick deviated from the national standard of medical care prior to the release of the hematoma. As appellee correctly notes, an expert's opinion is required to establish the national standard of care unless a layperson reasonably would be able to conclude that harm would not have occurred in the absence of negligence.[17] Plainly, this is not such a *res ipsa* case. Moreover, a bare assertion that the defendant doctor did not comport with the national standard of care is not enough. "The expert must explicitly indicate the basis for his or her knowledge of the national standard of care, state what the national standard of care is, and provide a basis for his of her

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[16]Brief for Appellant at 7.

[17]*See, e.g., Meek v. Shepard*, 484 A.2d 579, 581 & n.4 (D.C. 1984); *Derzavis v. Bepko*, 766 A.2d 514, 520 (D.C. 2000).

opinion testimony that another doctor has deviated from that standard."[18]

We must distinguish between expert opinion establishing the standard of care and expert opinion that there was a deviation from that standard. The former was necessary in this case; the latter may not have been, if other competent evidence showing a deviation was presented. In this case, the plaintiff's expert (Dr. Sheren) could not opine that the anesthesiologists deviated from the national standard of care prior to the release of Baker's hematoma, and of course the defense experts (Drs. Castellanos and Harris) rendered no such opinion. That, however, is not the end of our inquiry. The three experts basically agreed that while it was of paramount importance to establish and maintain Baker's airway to avoid anoxia, it was within the standard of care for the anesthesiologists to maintain her oxygen saturation levels above 90% with an air bag - and not employ a more invasive procedure to establish her airway - until the surgeon released her hematoma. The factual question is whether Dr. Begin and Dr. Fitzpatrick deviated from that standard because they were unable to maintain Baker's oxygen saturation levels above 90% using the bag. If that was so, and Baker's levels dropped dangerously below 90% in the (roughly fifteen-minute) period before Dr. Kowalski released her

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[18] *Hill v. Medlantic Health Care Group*, 933 A.2d 314, 328 (D.C. 2007). As appellant emphasizes, she may rely on the opinion testimony of the defense experts as well as her own. *See, e.g., Abbey v. Jackson*, 483 A.2d 330, 333-34 (D.C. 1984).

hematoma, then the anesthesiologists were obliged to try to establish Baker's airway by other, more invasive means - e.g., by intubation (which would have been difficult at best in Baker's case) or jet ventilation (as Dr. Sheren opined).

The parties differ on when Baker's condition became an emergency in this sense, and the experts are of little help because it is a largely factual matter. Dr. Sheren, for example, admitted that he didn't have any idea what [Baker's] oxygen saturation levels [were]" before Dr. Kowalski arrived. Appellant asserts that Baker's stridor, which became apparent around 3:20 p.m., "was a sign that her airway was in extremis, i.e., she was imminent danger of death"[19] as Dr. Castellanos testified, stridor develops when the air passage has narrowed to roughly 20% of its normal capacity.[20] Therefore, appellant argues, the jury could find that Baker "was not getting the proper amount of air delivered to her lungs" and was "not being properly

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[19]Brief for Appellant at 15.

[20]Appellant used this figure in cross-examining Dr. Fitzpatrick and Dr. Begin, and asserts that "neither . . . appreciated that stridor was a symptom of a seriously obstructed airway in which 70-80% of the area of the airway had been lost." Brief for Appellant at 38. That mischaracterizes the doctors' testimony, however. Dr. Begin was not asked whether stridor was a serious symptom; she only was asked if she could state what percentage of Baker's airway had been lost. Similarly, Dr. Fitzpatrick plainly identified stridor as a symptom of an obstructed airway but said that she could not identify the 80% mark as associated with stridor.

oxygenated" from that point onward.[21] Appellee, on the other hand, contends that view is belied by the more pertinent evidence of Baker's oxygen saturation levels.

The expert witnesses broadly agreed that stridor indicated a potentially serious condition and thus required close attention. Dr. Castellanos, for instance, testified that the onset of stridor requires a physician to take immediate steps to "secure the airway." Dr. Sheren described those steps as a "flow chart" or "algorithm of steps that should be taken by an anesthesiologist in the maintenance of an airway emergency." The first step, he said, is "to provide supplemental oxygen . . . [through] an oxygen mask, a nasal cannula or something like that." If that step is insufficient, the physician can next try a "bag mas," which is a tightly fitting mask that provides pressurized oxygen. Dr. Sheren noted that "[a] lot of times when a patient has [an] upper airway obstruction, [the bag mask is] not going to work because physically you can't move that air past it." The third possibility is an attempt to physically create a clear airway in the nose or mouth, and the fourth to use a laryngeal mask. The fifth, and most serious, is the establishment of a surgical airway - either by use of a cricothyroidotomy or jet ventilation.

But while stridor is evidence of a narrowing airway or an "upper airway obstruction," by itself it does not mean a patient is receiving an insufficient amount of oxygen. Appellant is therefore incorrect in suggesting that stridor necessarily signals an airway

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[21]Id. At 14.

"in extremis." The medical testimony refuted that suggestion. Obviously, a person must inhale suficient air to oxygenate the lungs. But as Dr. Harris explained, air is only about one-fifth oxygen. A person breathing 100% oxygen does not need to inhale the same volute of gas in order to inspire adequate oxygen. The anesthesiologists were supplying 100% oxygen to Baker via the Ambu Bag. There was no evidence at trial that Baker's 20% airway capacity was insufficient for the relatively brief period of time during which a diagnosis was made and a treatment (release of the hematoma) implemented. To the contrary, Dr. Sheren and Dr. Castellanos agreed that even a compromised airway could be sufficient to maintain a patient's oxygenation.

To be sure, the defense experts agreed that the onset of stridor requires a physician to take immediate steps to "secure the airway." But that begs the question of what "securing the airway" means. The goal of releasing the hematoma was to secure the airway; the Ambu Bag was used only to keep Baker's oxygen saturation levels at acceptable levels until that could be done. In those circumstances, according to the experts, the Ambu Bag was a reasonable interim measure so long as it worked. Dr. Sheren testified that one can "support" the airway without reintubing the pateint. "Reintubation would not be the first step you would take." Per both Dr. Sheren and Dr. Harris, a less invasive procedure, such as administering 100% oxygen through a pressurized mask, would be a better alternative as long as it maintained adequate oxygen levels.

The issue thus boils down to whether adequate evidence existed to permit a jury to conclude not simply that Baker's airway was narrowing, but that her oxygen saturation levels were dangerously low by the time Dr. Kowalski released the hematoma. Although appellant asserts in her brief that "[i]t was in dispute whether or not Drs. Begin and Fitzpatrick were providing Mrs. Baker with oxygen between approximately 3:20 p.m. and 3:30-3:35 p.m.,"[22] that is not so. All three doctors on the scene - Begin, Fitzpatrick, and Kowalski - testified (and other evidence confirmed) that the anesthesiologists were administering oxygen through a mask by the time Dr. Kowalski arrived. There is no evidence to the contrary. Furthermore, Dr. Begin, Dr. Fitzpatrick and Nurse Quzon each testified that Baker's oxygen saturation levels remained above 90% until after Dr. Kowalski released the hematoma. (Dr. Kowalski did not testify as to Baker's oxygen levels.) This testimony was undisputed at trial.

The sole piece of evidence that appellant cites to support her theory that Baker was receiving inadequate oxygen when Dr. Kowalski arrived at her bedside in his post-operation progress note. According to that note, Baker's oxygenation levels were in the 70%-80% range when Dr. Kowalski released her hematoma. For several reasons, however, we are not persuaded that this note was sufficient evidence for a reasonable jury to conclude that the anesthesiologists were negligent.

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[22]Brief for Appellant at 17.

To begin with, neither appellant nor anyone else mentioned the statement in Dr. Kowalski's progress note in the trial court. At trial appellant's focus was on what percentage of Baker's airway was obstructed as indicated by her stridor, not on what her oxygen saturation levels were before Dr. Kowalski released her hematoma. Even though the anesthesiologists' maintenance of Baker's oxygen saturation levels up to that time was the linchpin of their defense, appellant never disputed their testimony and that of Nurse Quzon that they kept those levels above 90% prior to Dr. Kowalski' intervention. Appellant did not ask Dr. Kowalski about the statement in his progress note suggesting otherwise, nor did appellant cite that statement to the trial court or the jury. Appellant ignored both the note and the issue it might have created.[24]

To be sure, it is not beyond the realm of possibility that a conscientious jury on its own might have noticed the statement about Baker's oxygen saturation levels in Dr. Kowalski's progress note and appreciated its possible significance. Even so, we consider it highly implausible to suppose that the jury would have credited and relied on that statement when (1) it was never mentioned at trial; (2) it was unsupported by a live witness; (3) it was contrary to the consistent and unchallenged testimony of three

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[24] We do not mean to suggest this was an oversight on appellant's part. It is not our place to speculate about appellant's trial strategy, but she may have had tactical reasons not to try to rely on Dr. Kowalski's arguable erroneous statement.

witnesses, Dr. Begin, Dr. Fitzpatrick and Nurse Quzon; (4) their testimony was corroborated by Nurse Quzon's progress note;[24] and (5) appellant did not dispute the defense claim that Baker's oxygen saturation levels were maintained above 90% until Dr. Kowalski released here hematoma.[25]

The entry of judgment as a matter of law does not require that there be *no* evidence whatsoever in favor of the non-moving party. Rather, although the evidence must be viewed in the light most favorable to the non-moving party, the "mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for

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[24]It is noteworthy, that in her closing argument, appellant identified Nurse Quzon as among the most credible witnesses, on whose account appellant was content to "rely":

> [I]n this case we had two very diligent nurses, Nurse . . . Quzon . . . . and Nurse Williams. And I'm going to rely very heavily on these two independent nurses. These nurses who had no dog in this fight, nurses who were doing their job who made their notes at or about the time not in contemplation of litigation and they were not involved in this litigation other than a peripheral way.

[25]It may be fair to add that, as the persons primarily responsible for keeping Baker oxygenated, the anesthesiologists and Nurse Quzon were likely to have been paying closer attention to her oxygen saturation numbers than Dr. Kowalski was, and over a longer period of time.

the [non-moving party]."[26] We conclude that a reasonable jury could not have relied on Dr. Kowalski's progress note to discount the abundant evidence that Baker's condition destabilized only when Dr. Kowalski released the hematoma, not before. The trial court's curative instruction, which essentially removed that issue from the jury's consideration, therefore was not erroneous.

For the foregoing reasons, the judgment of the Superior Court if affirmed.

ENTERED BY DIRECTION OF THE COURT:

GARLAND PINKSTON, JR.
Clerk of the Court

Copies to:

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[26] *Jones v. Thompson*, 953 A.2d 1121, 1124 (D.C. 2008) (internal quotation marks and citation omitted).

## APPENDIX C

## SUPPLEMENTAL JURY INSTRUCTION FROM THE BENCH

THE COURT -

> "I instruct you as follows: That there is no issue in this case that Dr. Fitzpatrick and Dr. Beg[i]n deviated from the standard of care by failing to preserve a[n] airway before the hematoma was released by Dr. Kowalski."
> [JA-1342-43]

THE JUROR:

> "Your Honor, could [you] please explain again the statement you brought up regarding Dr. Fitzpatrick and Dr. Beg[i]n." [JA-1344]

THE COURT:

> I'm not sure I can explain it, I can repeat.

THE JUROR:

> Just repeat, thank you.

THE COURT:

> Sure. "That there is no issue in this case that Dr. Fitzpatrick and Dr. Beg[i]n deviated from the standard of care by failing to secure an airway before the hematoma was released by Dr. Kowalski. [JA-1345]